314 U.S. 678

No. 536

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CHARLES ELMORE CROPLEY
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In The Supreme Court Of The United States

APPEAL FROM THE SUPREME COURT OF OHIO

No. 28,593

AND

FROM THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

No. 17,644

314 U.S. #2
HAL-HAN

ROBERT W. HALLIDAY,
Petitioner,

vs.

S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY,
Appellee

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

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FRANK WILES,
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PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

To the Honorable Harlan F. Stone, Chief Justice of the United States; to the other Justices of said Honorable Court, and to the Honorable Supreme Court of the United States:

Now comes Robert W. Halliday, resident of Cleveland, Ohio, Petitioner herein, and says:

(1) Heretofore and on or about the 16th day of August, 1937, an action was commenced in the Court of Common Pleas of Cuyahoga County, Ohio, by Robert W. Halliday of Cleveland, Ohio, Plaintiff, against S. H. Squire, Superintendent of Banks in charge of liquidation of The Union Trust Company as defendant. The Petition in said

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Action alleged a claim for damages of Seven Hundred Forty One Thousand, Six Hundred Fifty-two Dollars and Eighty-nine cents ($741,652.89) resulting from injury to rights of the Plaintiff not arising on contract.

The Petition of the Plaintiff, the amended answer of the Defendant, and the Reply thereto were the pleadings which the Common Pleas Court of Cuyahoga County, Ohio, had before it when this case was called for a so-called *Pre-trial* hearing. The Defendant moved for judgment on the pleadings, and this motion was granted by the Common Pleas Court. No evidence whatsoever was heard or submitted to the Court.

The Defendant contended that the pleadings showed on their face that the Plaintiff was not entitled to any relief; That he was not entitled to any trial, by jury or otherwise; That there was no issue to try.

Plaintiff contended that the allegations in his petition were sufficient in Law to state a cause of Action for Money, Seven Hundred Forty One Thousand, Six Hundred Fifty-two Dollars and Eighty-nine cents ($741,652.89), and that the answer of the Defendant and the Plaintiff's reply do not change the character of the Plaintiff's cause of action, but raises issues triable before a Jury.

Look at the Plaintiff's Petition.

Look at the amended answer of Defendant.

First Defense set up in the amended answer raises issues on which Plaintiff is entitled to a jury trial.

In the case of *Rhodes vs. McDowell 24 OL APP. 94*, the Court held: "A judgment upon the pleadings cannot be rendered when issue is joined upon a material proposition."

Second Defense raises an issue which could have been determined by the Court, but Plaintiff filed a reply containing the following allegations:

"****the Defendant, the Liquidator of the Union Trust Company acknowledged receipts of Plaintiff's proof of claim on or about June 14, 1937; that said defendant thereafter held such proof of claim in silence; that on or about the end of July, 1937, the Plaintiff became apprehensive that the inaction of the Liquidator might be intentionally prolonged beyond the time when the Plaintiff's claim would become barred by Section 11224 of the General Code of Ohio, and notified the Liquidator in writing (by Registered Mail) that unless the claim was allowed or rejected on or before August 5, 1937, that said Plaintiff would consider that the Liquidator had rejected the claim; that said Liquidator failed to make response to Plaintiff's message and maintained silence beyond said August 5, 1937; that promptly after said August 5, 1937 Plaintiff prepared his Petition in the pending case and filed the same—on or before August 16, 1937, (Common Pleas Court No. 466,490) after rejection and within the time required by Section 710-92A of the Gen. Code."

Whether such was a filing without awaiting rejection from the Superintendent of Banks or not was a question of determination by a Jury.

Third Defense set up in the Amended Answer does not raise an issue.

The allegations set forth in said Third Defense are insufficient in Law to invoke estoppel by judgment and do not constitute a defense:

(1) because the prior judgments pleaded therein were not between the same parties;

(2) because the prior cases did not involve the same subject matter. The former actions involved the title of Real Property.

In the pending case Plaintiff asked for damages resulting from a *Conspiracy to Cheat* and for *Fraud practiced by The Union Trust Company.* The Union Trust Company was not a party to any of the prior suits pleaded by the Defendant.

Coates vs. Chillicothe State Bank 23 O. S. 415. Judge Day says: "It is true there is much in the petition, and in the prayer thereof, that looks like an effort to open the decree sought to be impeached, for the purpose of a retrial of the case."

But the parties in the two cases are different, and only that part of the decree affecting the plaintiff is impugned.

Wittee vs. Lockwood 39 O. S. 141. Judge Okey stated the General Rule to be that a party when sued is bound to set up every defense legal or equitable or both, which he may have to an action, and effectively waives those not pleaded, but an exception to the rule exists where a possible defense constitutes a set-off or counterclaim, and may become the basis of a new suit and this is true in those cases where different parties are found in the second case.

Fourth Defense contains a material allegation, to wit: "that at the time Plaintiff filed his petition herein more than four years had elapsed since he had knowledge of the Fraud alleged in the Petition." *Plaintiff filed a reply denying this allegation.*

The conspiracy alleged in the case at bar was not discovered by the Plaintiff until after he became Administrator d.b.n. of the Estate of Janet M. Halliday, deceased, and after he obtained possession of the books and papers of the Estate. This was after August 16, 1933 and within four years from the time when he commenced this action.

The question as to when Plaintiff discovered the Fraud is a question for a Jury to decide.

Plaintiff asserted that denial of the right of trial by Jury constitutes a violation of the Constitution of the State of Ohio, Article I, Section 5, and Amendment XIV, Section 1 of the Constitution of the United States. In consequence the motion to dismiss the appeal should be overruled.

Thereafter, on or about the 18th day of November, 1939, said Common Pleas Court of Cuyahoga County, Ohio, rendered final judgment against said Plaintiff and subsequently said judgment was entered in said action, which judgment provided as follows:

> "This cause came on to be heard and was submitted to the court on the pleadings. Thereupon, the motion by defendant for judgment on the pleadings is granted. It is therefore considered that said defendant go hence without day and recover of said plaintiff his costs of this suit. Judgment is rendered against the plaintiff for the costs herein."

Thereupon your Petitioner, the Plaintiff in said action, duly excepted to said judgment, and duly appealed from said judgment to the Court of Appeals, Eighth Judicial District of Ohio. Said Appeal duly came on for argument before said Court of Appeals, and your Petitioner, through his counsel, duly argued that said judgment should be reversed, and that said Plaintiff should be granted a hearing on the merits; and your Petitioner, then in said Court of Appeals, insisted that he had a right under the Constitution of Ohio to a trial by jury and that denial thereof would constitute a violation of Amendment XIV, Section 1 of the Constitution of the United States, and that Plaintiff was entitled to have all questions concerning said right determined by said Court of Common Pleas at a hearing on its merits.

Thereafter, on or about March 10, 1941, an order was spread upon the Journal in the office of the Clerk of said Court of Appeals, which order affirmed said judgment of said Common Pleas Court in the following words:

> "This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; and on consideration of all the assigned errors, the Court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Court of Common Pleas is affirmed, there being, however, in the opinion of the Court, reasonable ground for this proceeding in error. It is therefore considered that said Appellee recover of said Appellant his costs herein. Ordered, that a special mandate be sent to said

Court of Common Pleas, to carry this judgment into execution."

Thereupon your Petitioner duly excepted to said judgment, and duly appealed from said judgment to the Supreme Court of Ohio, by duly filing an Appeal of Right, and duly requested said Supreme Court of Ohio to allow the Appeal of Right and filed briefs in support of said Appeal, and insisted that he had a right under the Constitution of the State of Ohio and Amendment XIV, Section 1 of the Constitution of the United States, to a jury trial and that Plaintiff was entitled to have all questions concerning said right determined by said Common Pleas Court of Cuyahoga County, Ohio, at a hearing on its merits, but that said Supreme Court of Ohio refused to allow said Appeal of Right, and thereafter, on or about May 22, 1941 affirmed said Judgment of said Court of Appeals, and caused to be spread upon the Journal of the Clerk of the Supreme Court of Ohio the following entry:

"This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County upon the motion of the Appellee to dismiss the appeal filed of right herein, and argued by counsel.

"On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause."

"It is further ordered and adjudged that the Appellee recover from Appellant his costs herein expended."

Said decisions of said Courts and Judges, and of each of them, denied to your Petitioner the right held by your Petitioner under the Constitution of the State of Ohio, Article 1, Section 5, and Amendment XIV, Section 1 of the Constitution of the United States.

Wherefore, your Petitioner prays that a Writ of Certiorari may be issued, and that he may be allowed to bring up for review before the Supreme Court of the United States, the judgment of said Supreme Court of Ohio, and

that your Petitioner may have such other and further relief in the premise as may be just.

JAMES BRAVO, WM. T. ARNOS, R. W. HALLIDAY,
Attorneys for Petitioner,
1245 Leader Building,
Cleveland, Ohio.

STATE OF OHIO,
CUYAHOGA COUNTY, } ss:

ROBERT W. HALLIDAY, being first duly sworn, says: I am the foregoing Petitioner, and that the foregoing Petition is true to my own knowledge.

SWORN to before me this .... day of August, 1941.

Notary Public.